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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. WILLIAM RANDALL,
Plaintiff and Respondent,

—vs.—

TRACY COLLINS TRUST COMPANY, Executor of the Estate of SARAH P. RANDALL BRERETON, Deceased,
Defendant and Appellant.

Civil No. 8430

Appellant's Brief

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STATEMENT OF FACTS

This is an appeal taken by Tracy Collins Trust Company as Executor of the Estate of Sarah P. Randall Brereton, deceased, from a Judgment and Decree entered by the Honorable William Stanley Dunford, Judge of the District Court of Utah County, on the 6th day of July, 1955, and from the order of the Court denying Appellant's Motion for a new Trial dated September 8th, 1955.

The action was originally commenced by Respondent on October 29, 1954, claiming that at some time between April 1, 1946 and September 1, 1946 Sarah P. Randall Brereton, now deceased, "proposed to Plaintiff that if he would leave his business in Ogden, Utah, dispose of his home and move his family to Provo, and become an employee of the State Bank of Provo, of which deceased owned stock control, and devote his time and attention to the personal and financial affairs of deceased and to her welfare, during the remainder of her lifetime, she would, in consideration of such acts and services on the part of Plaintiff, leave to him by Last Will and Testament all her stock in the said State Bank of Provo which she should own at the time of her death, together with her residence in Provo, Utah."

The Complaint further alleges that Plaintiff agreed with decedent that he would undertake and perform such obligation and services; that he did so; and that notwithstanding the decedent did, pursuant to said agreement, leave Plaintiff said bank stock and residence, said decedent thereafter on or about October 23, 1951 in violation of said contract "performed and being performed by Plaintiff" changed her Will and left said bank stock to one Ross Richards.

The answer of the Defendant set up the defense that the complaint failed to state a claim upon which relief could be granted and in any event denied the existence of any agreement or that Plaintiff had performed any agreement entitling him to recover. Defendant further pleaded the Statute of Wills and the Statute of Frauds.

The Court never formally ruled upon the defense that the complaint fails to state a claim upon which relief could be granted.

Upon request of the Plaintiff, and over objection of the Defendant, the Court set the cause down for jury trial, stating that "there seems to be so much of fact involved in the presentation and disproof of the claimed agreement and the compliance or noncompliance therewith that it felt the jury could give the Court considerable assistance." (R.p. 36) (Reference is made to this matter specifically for the reason that it evidences the apparent attitude of the Court throughout this case that the actual burden was upon the Defendant to disprove the existance of the agreement rather than upon the Plaintiff to prove the existance thereof).

The decedent Sarah P. Randall Brereton, was 95 years old at the time of her death on June 4, 1954. She, and her husband before her, had been the chief stockholder and directing officer of the State Bank of Provo. Mr. Brereton died in November, 1938, and thereafter Mrs. Brereton took an active part in the administration of the affairs of the bank until a short time prior to her death.

Apparently the first Will which Mrs. Brereton executed was shortly after her husband's death. On April 22, 1940 she executed a Will which, after providing for various specific bequests, willed to Plaintiff J. William Randall, Ross Richards, and Tracy Collins Trust Company as Trustees, 126 shares of the capital stock of the State Bank of Provo with authority vested in said

Trustees to vote during the term of the trust. The trust was to continue for a period of ten (10) years following Mrs. Brereton's death, or until the death of the Plaintiff, J. Willaim Randall, or until the stock was sold by the Trustees, whichever event occured first. The income from the stock, under the terms of the trust, was to be paid to the Plaintiff during the period of the trust. Upon the expiration of ten (10) years, or upon the sale of the stock by the Trustees, the rest of the trust was to become the property of Mr. Randall absolute. But if Plaintiff died during the trust, then the property was to be sold and the proceeds distributed to his children, share and share alike.

The will further had a residuary clause by which all of the "rest and residue" of decedent's property was to go to the Plaintiff, "outright and absolute", or to his children in the event Plaintiff did not survive the testator.

This Will remained in effect without change until June 24, 1941, when testatrix executed a codicil which changed some of the specific bequeaths. Again, on October 21, 1941, Mrs. Brereton made a second codicil which, among other things, changed the provision of the Will with respect to Plaintiff's participation therein by providing that in the event Plaintiff died prior to testatrix, or during the existance of the trust, the bank stock would be divided among 14 named relatives, incluing Ross Richards. On May 7, 1946, Mrs. Brereton executed a third codicil in which she cancelled all provisions relating to the trust and any benefits to be derived

therefrom in favor of the Plaintiff and his heirs. The effect of this change was to throw the bank stock into the residuary clause of the Will which remained unchanged and which bequeathed all the rest and residue of said property to the Plaintiff.

In the fall of 1946, the Plaintiff, J. William Randall, left Ogden, Utah and went to Provo where he began to work full time in the bank. Prior to that time, and from about 1940 on, Mr. Randall had been a director in the bank and participated in the directors' meetings. When he first came down in 1946, he became what he termed himself as "Active Vice-President," although he had been Vice-President for some time prior thereto. (Tr. 102). Later in 1946, he bought a home in Provo and subsequently moved his family down, and they have since lived in Provo.

Mrs. Brereton's Will remained unchanged from May 7, 1946, until October 23, 1951 when she executed her fourth codicil by which she specifically left to Plaintiff her home, furniture, fixtures, and equipment, and changed the residuary clause therein so as to make Ross Richards her legatee. She died on June 4, 1954, approximately two years and nine months later without further change in the Will.

Upon the Will being admitted to probate, Plaintiff herein commenced this action alleging an oral agreement between the Decedent and the Plaintiff as above set forth and requesting the Court to require the Tracy Collins Trust Company as Executor of the Will specifically to perform such oral agreement. Plaintiff also filed

objections to the admitting of the Will to probate, contesting the fourth codicil upon the grounds and for the reasons that the decedent "was continuously not of sound and disposing mind because of decedent's advanced age, and that said decedent was therefore incapable, because of unsoundness of mind, of making a codicil to her Last Will and Testament." Plaintiff further alleged that the beneficiary to said fourth codicil, Ross Richards, controlled and influenced the mind and action of decedent "to the extent that the said Ross Richards did succeed in substituting his will for the will of said decedent, and that at the time of the execution of the document dated October 23, 1951, purporting to be a fourth codicil to her Last Will and Testament, decedent was not following the dictates of her own will, but was acting wholly under the influence of said Ross Richards and that said purported fourth codicil was not the free and voluntary act of decedent, but it was solely the result of the undue influence of said Ross Richards." (See, Probate File No. 10915, admitted in evidence).

The Will contest action is now pending in the District Court and has not yet been heard. (The very fact that Plaintiff herein has filed an action attempting to set aside the last codicil of decedent's Will indicates the weakness of his position in this action, purporting to claim a verbal agreement between him and the decedent, whereby decedent allegedly agreed to leave Plaintiff her property.)

The Trial Court held a pre-trial at which two issues of fact were framed for determination as follows:

"1. On or about the last of April, 1946, did decedent and the Plaintiff enter into an agreement whereby the decedent agreed that in consideration of Plaintiffs leaving his business in Ogden, selling his home and moving his family to Provo and becoming an employee of the State Bank of Provo, in which bank decedent owned the controlling interest, and would thereafter devote his time and attention to the personal and financial affairs of decedent and her welfare during the remainder of her lifetime, that she would leave to him by her Last Will and Testament all of her stock in said State Bank of Provo, constituting a controlling interest therein, and the home which she then owned, being the property described in paragraph 3 of the Plaintiff's complaint?

"2. If so, has the agreement been performed by the Plaintiff?"

In addition to the above issues of fact the Court framed three issues of law as follows:

"1. If any agreement, as claimed by Plaintiff, was made, was such agreement in violation of the Statute of Frauds?

"2. If any agreement, as claimed by Plaintiff, was made, was such agreement in violation of the Statute of Wills?

"3. If any agreement, as claimed by Plaintiff, was made, was legal consideration given for the agreement?"

Over the objection of the Defendant, the Court placed the matter on the jury calendar for trial, which commenced on March 21, 1955. Following the conclusion of the evidence the matter was submitted to the jury

upon special interrogatories which were found in favor of the Plaintiff and against the Defendant. Thereafter the court set the matter down for argument by counsel, which argument was held in June, 1955. Subsequently the Court on the 24th of June rendered a memorandum decision in favor of the Plaintiff and against the Defendant. On July 6th Findings of Fact, Conclusions of Law, and Judgment were filed; and thereafter on July 14th defendant filed a motion to amend the Findings, Conclusions and Judgment and also filed a motion for New Trial. After hearing the arguments of counsel on the foregoing matters the Court on September 8, 1955, modified its Findings of Fact and Conclusions of Law and having so modified the Findings denied Defendant's motion to amend and for a New Trial. Thereafter, within the time required, the Defendant took this appeal.

STATEMENT OF POINTS

Appellant relies upon the following propositions for reversal of the Judgment of the Trial Court:

1. The pleadings are insufficient to set forth any right to relief by way of specific performance.

2. The evidence is insufficient to justify any Finding that an Agreement existed.

3. The evidence is insufficient to show that the Plaintiff fulfilled the terms of any purported Agreement.

4. The evidence conclusively shows that Plaintiff could be, and was, compensated fully for any services rendered by him for decedent.

5. The Court erred in refusing to allow the introduction of evidence relating to Plaintiff's income before and after he came to Provo and began working at the Bank.

6. The Court erred in admitting testimony of the witness, Clyde Sandgren, who was decedent's attorney, of conversations between himself and decedent.

7. The Court erred in submitting the matter to the jury and in its instructions on the effect to be given to the evidence by the jury.

8. The trial court erred in following the verdict of the jury and in entering Judgment in favor of the Plaintiff and against the Defendant.

For convenience of the Supreme Court in reviewing the case, the foregoing points have been consolidated into the following propositions for discussion and argument in the Brief:

POINT I

THE PLEADINGS AND EVIDENCE ARE INSUFFICIENT TO JUSTIFY A FINDING OF AN AGREEMENT BETWEEN DECEDENT AND PLAINTIFF.

POINT II

THE PLEADINGS AND EVIDENCE REQUIRE THE FINDING THAT ANY SUCH PURPORTED AGREEMENT WAS WITHIN THE STATUTE OF FRAUDS AND UNENFORCEABLE.

POINT III

THE COURT ERRED IN CERTAIN RULINGS ON THE EVIDENCE.

POINT IV

THE COURT ERRED IN SUBMITTING THE MATTER TO THE JURY AND IN FOLLOWING ITS DETERMINATION OF THE FACTS.

ARGUMENT

POINT I

THE PLEADINGS AND EVIDENCE ARE INSUFFICIENT TO JUSTIFY A FINDING OF AN AGREEMENT BETWEEN DECEDENT AND PLAINTIFF.

At the outset we wish to point out that this being an equity case, this Court will review all of the facts to determine if there is substantial evidence to support the decision of the lower Court. *Lake Shore Duck Club v. Lake View Duck Club,* 50 Utah 76, 166 Pac. 309. There this Court said that in an equity case the court would "review the testimony for the purpose of determining what the facts are and the equities of the parties, even though its views are in conflict with the findings of the trial court."

The basis of Plaintiff's claim is set out in paragraph 2 of the Complaint to the effect that Decedent "proposed to Plaintiff that if he would leave his business in Ogden, Utah, dispose of his home and move with his family to Provo, and become an employee of State Bank of Provo, of which deceased owned stock control, and devote his time and attention to the personal and financial affairs

of deceased and to her welfare, during the remainder of her lifetime, she would, in consideration of such acts and services on the part of Plaintiff, leave to him by Last Will and Testament all her stock in the said State Bank of Provo which she should own at the time of her death, together with her residence in Provo, Utah; Plaintiff agreed with Decedent that he would undertake and perform such obligations and services, and shortly thereafter, and as expeditiously as possible, sold his Ogden home and moved to Provo, and during the remainder of the lifetime of Decedent, cared for her and her affairs, both personal and financial and became and continued an employee of said State Bank of Provo. (R. p. 4)

In its amended Findings the Court found:

> "1. That between April 1 and September 1, 1946, Plaintiff and Sarah P. Randall Brereton entered into an oral agreement by the terms of which the said Sarah P. Randall agreed that if Plaintiff would sell his home and leave his business in Ogden, Utah, move with his family to Provo, Utah, become an employee of the State Bank of Provo and would devote his time, talents, energy and attention during her lifetime to caring for her business and financial affairs, particularly her bank, giving advice and counsel in respect to other matters and caring for her personal affairs such as rendering her personal services, care and attention, caring for her home, furnishing her companionship, meals, protection during illness and the maintenance of her home and grounds in an efficient operating condition, that upon her death she would leave to him by her Will her home in Provo and her stock con-

stituting controlling interest in the State Bank of Provo." (R. 60-62)

The findings go beyond what is claimed in the Complaint in an attempt to set out a sufficient agreement to justify the Court in ordering its performance. Yet, as will be seen hereinafter, there is no testimony in the record that in any way would indicate that Plaintiff rendered decedent "personal services, care and attention, caring for her home, furnishing her companionship, meals, protection during illness," because of any contractual obligation. Certainly the mere fact that some such services were rendered is no evidence of a contract to perform them.

In the beginning, the complaint does not set out, as a part of the alleged agreement between Plaintiff and Decedent, any specific acts which the Plaintiff was to perform except to move from Ogden, Utah, to Provo, to become an employee of the bank, and devote his time and attention to the personal and financial affairs of deceased and to her welfare. Obviously it would be impossible for Plaintiff to undertake employment at Provo, Utah at the bank unless he sold his home in Ogden and moved to Provo. Likewise, since Mrs. Brereton's financial interests were tied up with the bank, the attention the Plaintiff might give to the bank affairs would, in all probability, inure to the benefit of Mrs. Brereton financially—at least if such activities were profitable. However, the complaint in no way claims any purported agreement whereby Plaintiff was to render to the decedent personal service, care and attention, caring for her home, furnishing her company,

meals, protection during illness and the maintenance of her home and grounds in an efficient operating condition. Yet that is what the court found was the Agreement in its amended Findings set forth above. The only allegation in the complaint relating to an agreement was that such agreement related to personal and financial affairs.

Insofar as the evidence is concerned, there is very little, if any, competent and material testimony that any agreement at all was made between the parties. The witness Mildred Brereton, a niece of the decedent, testified over the objection of counsel for Defendant, that in the spring of 1939, decedent told the witness that if the latter would live with decedent and take care of her during the remainder of her life, decedent would give the witness what property she had. (Tr. 13) Although the foregoing is so remote in time that counsel objected to it on the grounds that it was both immaterial and irrelevant, it further does not in any way tend to establish any agreement between decedent and the Plaintiff herein. As a matter of fact, the proposition if made by decedent to the witness, appears to have required the witness to stay with decedent and take care of her. There is no claim by Plaintiff that he stayed with decedent or that he personally took care of her, the evidence being that decedent had a special housekeeper or nurse during her declining years. (Tr. 32,33)

Subsequently, in the fall of 1939, the witness testified that decedent asked to be driven to Ogden to see the Plaintiff stating that she was "going up to see

if she could make any arrangements to get Will Randall to come down and take over her personal and business affairs. She said she needed someone she could trust and who had the ability and understood the banking and lumber business." (Tr. 16)

Again, if this testimony is material for any purpose it relates only to a business relationship to be established between the parties and not to any relationship involving filial service, affection, compaionship, or association. Even the final conclusion of the witness' testimony to the effect that when she was advised by decedent that Mr. Randall was coming to Provo decedent said, "she had worked out an agreement with Will whereby he would come down and take over the bank"; and also that "he was to take over her personal affairs and also at that time the lumber yard," (Tr. 22) involves nothing more than a business relationship for assistance to decedent in managing her financial matters. Counsel for the Plaintiff indulged in considerable leading and suggestive questions which were objected to; but even his questions did not suggest any agreement of personal companionship, care, affection and association. I quote from the Transcript, pages 22, 23 as follows:

> "Q. (Continuing) I asked you if she said what Will was to get in return for the duties he was to perform for her and at the bank?
>
> "A. She said he was to get the bank stock and her home."

Other witnesses relied upon by Plaintiff to show an agreement were Mr. Money and Mr. Charles Dickson,

who were banker friends of the Plaintiff, residing in Spanish Fork, Utah. They testified they had been interested in acquiring decedent's stock in the State Bank of Provo. Mr. Money testified that Mrs. Brereton "made the statement that she had turned her interest over to Will Randall, and that he was coming down to take care of her banking interest and also her." (Tr. 39). On redirect examination, and upon a leading question being asked by Plaintiff's counsel, the witness testified, "She gave us to understand very definitely that she had made a deal with Randall and turned her interests over to him and he was coming down to operate her interests." (Tr. 40)

Mr. Dickson's testimony was to the affect that decedent stated "that Will was coming down to take over her interests in the bank, that a deal had been made with him for that purpose."

> "Q. Did she say what Will was supposed to do?"
>
> "A. No, I don't know that she detailed his duties, but she said that he was coming down; a deal had been made with him; that she wasn't interested in selling her bank stock; that a deal had been made with him and that she wasn't interested in selling." (Tr. 43)

On cross-examination Mr. Dickson could not tell when the purported conversation took place, nor as to any more details thereof.

The testimony of Mr. Money and Mr. Dickson might well be read in the light of the testimony of Clyde

Sandgren, an attorney. Mr. Sandgren's testimony was objected to as being privileged, and that matter will be discussed hereinafter. However, even conceding for the moment that his testimony was properly admitted, it shows only an intention to give to Plaintiff sufficient stock to control the bank—not in consideration of personal services to be performed, but by way of an inducement to get him to come to Provo and look after her interests at the bank. Mr. Sandgren testified:

> "Q. Would you state what she said to you with respect to her agreement with Will Randall?
>
> "A. She said that she had asked Mr. Randall to come to Provo to look after her interests at the bank, and as an inducement, had promised to leave him the controlling interest in the bank, through her will. She stated she had directed that 126 shares out of the 150 owned by her be given to Mr. Randall.
>
> "Q. That is the substance of it?
>
> "A. That is the substance of it." (Tr. 81)

In response to further interrogation by Plaintiff's counsel as to what if any personal services Mr. Randall was to perform, the witness testified:

> "Q. Did she say anything to you about what Mr. Randall had done for her personally, or anything of that sort?
>
> "A. No, she did not." (Tr. 81)

On cross examination Mr. Sandgren indentified Exhibit A, which was received in evidence, as a letter decedent had requested Mr. Sandgren to prepare and send to Tracy-Collins Trust Company in connection with

her Will, which at that time left to the Plaintiff all of her bank stock under the residuary clause thereof. This letter said nothing about any agreement between decedent and the Plaintiff, As a matter of fact, the reference to Plaintiff therein is in complete harmony with the terms of her Will as it then existed to the effect it was "my intent that my nephew, J. Will Randall, receive under my will a sufficient number of shares of State Bank stock to give him, together with the shares already owned by him, a margin of control." (Tr. 82, 83)

The witness further testified:

> "Q. She said nothing about what her future intent might be, at any time in the future, but only that that was her intent so far as her present intent and thinking was concerned, isn't that right?
>
> "A. I don't know that she ever projected herself into the future as to what she might want to do.
>
> "Q. As far as you personally were concerned, you knew that a person legally could change their will at any time they so desired?
>
> "A. Yes.
>
> "Q. She indicated at that time that she wanted to know that Will would get the control if she died. That is right, isn't it?
>
> "A. That is right."

The foregoing testimony of Mr. Sandgren, if considered admissable, and Mr. Money and Mr. Dickson would indicate that any agreement between decedent and Plaintiff related only to the bank stock and then only

as an inducement to get Plaintiff to come into the bank and manage the same, for which service Plaintiff was otherwise sufficiently compensated by salary.

The only significant statement the witness, Mrs. J. A. Zenger made was that when she commented to the decedent that the latter was fortunate to have such attentive niece and nephew-in-law, decedent stated "that she felt she had it coming to her because the Randalls were going to be taken care of." This statement, contrary to showing any agreement between decedent and plaintiff, would indicate that no agreement existed; that plaintiff was going to be provided for by Will—not because of any legal obligation on the part of decedent but because decedent at that time desired her nephew to be the recipient of her bounty. As will hereinafter be demonstrated, plaintiff did receive considerable financial assistance from decedent during her life time and was to receive considerable from her under the terms of her Will.

Mr. William W. Brereton, great-nephew of decedent and husband of the witness, Mildred Brereton, testified on direct examination by leading and suggestive questions on the part of plaintiff's counsel that,

> "A. I can't recall the exact date or the year, but she mentioned on more than one occasion that Will was supposed to get her bank stock and her home.
>
> "Q. Did she characterize it as an agreement, or a deal?
>
> "A. It was an agreement between her and Will.

"Q. What was Will to do in exchange for it?

"A. He was to come down and take care of her and her business or her affairs.

"Q. And her, is that right?

"A. And her.

"Q. Did she say what he was supposed to do in taking care of her?

"A. Supposed to take care of the house and grounds; the furnace and the home, and take care of her business." (Tr. 60, 61)

However, on cross examination this same witness admitted that previously in his deposition he had testified differently, as follows,

"Well, she told me more than once that Will was to get what she had. Now what it was, I don't know for sure. It might have been everything, but I imagine that was it, because when she said he was to get it all, what would you say? . . . .

"Q. And that is as you remember what she said, is that right?

"A. (Witness nods head.)" (Tr. 63)

He further admitted on cross examination that at the time of the taking of his deposition he had stated that decedent had told him Will was to get her estate and that Will was to "take care of the bank and her business"; that that was all he remembered of the conversation. (Tr. 64)

It is significant that Mr. Brereton was not present during testimony of his wife and the plaintiff at the

time of taking the depositions, while he was present during the giving of the testimony by his wife at the trial. (Tr. 65) In trying to explain why he did not mention taking care of the home at the deposition the witness said that speaking of taking care of the bank and decedent's business he thought, would include the home. (Tr. 65) He also stated that he had been a director in the bank and had worked closely with plaintiff for several years; that he had talked to plaintiff several times about this case, particularly one occasion prior to the death of Mrs. Brereton when he knew that something wasn't just right. (Tr. 66)

We submit that Mr. Brereton's testimony is so vague, uncertain, and contradictory that it is worthy of no consideration. He testified on one occasion that plaintiff was to get everything decedent had and then on another occasion that he was to get the bank and home. He testified further that plaintiff was only to take care of decedent's bank and business and on another occasion, bank, business and home.

Such testimoy, and indeed all of the testimony in this case, falls far short of the requirement laid down by this Court and other courts to the effect that before a party can obtain specific performance of a parole agreement to convey land the agreement, and each and every term thereof, must be proved by clear, convincing and unequivcal evidence.

In the case of *Price v. Lloyd,* 31 *Utah* 86 *P.* 767, the court was confronted with a claim on the part of

the Plaintiff that she was a niece of the decedent and had married his son; that decedent promised Plaintiff to give her the real property, which she occupied during the latter part of the deceased lifetime, in consideration that Plaintiff would "continue to attend to his wants and assist him." The Lower Court found in favor of the Plaintiff and against the Defendant. However, on appeal the judgment of the lower court was reversed, the Supreme Court stating among other things that

> "the contract must also be complete and certain in its terms; and that 'this element of completeness must exist in every contract which can be specifically enforced, whatever be its external form, whether written or verbal, whether embodied in memorandum required by the statute of frauds, or render obligatory by part performance, or by any other act which may obviate the prohibition of that statute.' Pomeroy, Section 145."

This doctrine was later re-affirmed in the case of *Hargreaves v. Burton,* 59 *Utah* 575, 206 *P.* 262, where the Court held

> "In Price v. Lloyd, 31 Ut., 86, 86 P. 767, 8 I.R.A. (N.S.) 870, which was an action for the specific performance of a parol agreement or gift of land, the court held that the contract must be complete and certain in its terms. In spport of this proposition the court, at page 97 of 31 Utah, at page 770 of 86 P. quotes with approval the following excerpt from Pomeroy on Specific Performance of Contracts (2d Ed.) Sec. 145.
>
> ". . . . In the beginning of the section referred to the same author says:

> 'It is elementary doctrine of the courts of equity that they will not specifically enforce any contract unless it is complete and certain.'

"The following authorities cited by appellant are to the same effect: Beall et al. v. Clark, 71 Ga. 818; Allen v. Webb, 64 Ill. 342; Rogers Locomotive & Mach. Works v. Helm, 154 U.S. 610, 14 Sup. Ct. 1177, 22 L. Ed. 562; Pike v. Pettus, 71 Ala. 98; Langston v. Bates, 84 Ill. 542, 25 Am. Rep. 466; 13 C. J. 263. See also, Quinn v. Daly, 300 Ill. 273, 133 N.E. 290, in which it is said:

> 'A contract will not be enforced unless the terms are clear, certain and unambiguous.'

"—and Marti v. Ludeking (Iowa) 185 N.W. 476, wherein the court says:

> 'Contracts to be specifically enforced must be so certain and definite in their terms as to leave nothing to conjecture or to be supplied by the court, and they must be mutual.'

"See, also, Albia Light & Railway Co. v. Gold Goose Coal & Mining Co. (Iowa) 185 N.W. 571.

"In C. J. supra, it is said:

> 'In order that there may be an agreement, the parties must have a distinct intention common to both and without doubt or difference. Until all understand alike, there can be no assent, and therefore no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms.'"

Not only must the terms of the contract be complete and certain but also such terms must be proved by clear

and convincing evidence. See *Clark v. Clark,* 74 *Utah* 290, 279 P. 502; *Clark v. George* 120 *Utah* 350, 234 *P.* 2d. 844.

In the latter case the Court reviewed prior cases decided on this point and held:

> *"This court has repeatedly insisted upon the necessity of definiteness in the provisions of oral contracts for the conveyance of land in consideration for care and attention by a member of the family of the promiser.* Price v. Lloyd, 31 Utah 86, 86 P. 767, 8 L.R.A.N.S., 870; Montgomery v. Berrett, 40 Utah 385, 121 P. 569; Van Natta v. Heywood, 57 Utah 367, 195 P. 192; Clark v. Clark, 74 Utah 290, 279 P. 502. In this case, the Plaintiff's evidence is that the little house was to be theirs, whether by deed or by will or in what fashion or at what time is not mentioned. The defendant denies ever writing the letter to the Plaintiff, offering to give them the little house and testified that he permitted them to move into it because they had no place to live . . . . we do not disagree with the trial court's findings: 'The court specifically finds that there never has at any time been any contract between the plaintiff and the defendants, or either of them, nor with Margaret Ann George during her lifetime, for the conveyance of real estate herein before described, or any part thereof, or any of the improvements thereon, and all the allegations of plaintiff's complaint to the effect that there were contracts for the conveyance of said property to be untrue, because of the insufficiency of the evidence' . . . . The rule is stated in Clark v. Clark, supra, that the plaintiff, in declaring specific performance of an oral contract must establish the terms thereof with a greater degree of certainty than is required in an action at law, and

he must show a clear mutual understanding and a positive agreement of both parties to the terms of the contract.'" (Italics added)

A very good annotation on the subject of compelling specific performance of an oral contract to convey real property is found in 69 A.L.R. Pages 14 to 214, in connection with the case of *Andrews v. Aiken,* 44 Idaho 797, 260 P. 423. Pages 48 to 57 of this annotation deals with the requisite as to certainty of the terms of the contract. As stated therein:

> ". . . . a court of equity is never anxious to grasp at slight circumstances to rescue it from the operation of the statute, nor does it indulge in any latitude of construction if there is any equivocation or uncertainty in the case presented. *It adopts the rule that the contract should be clear and definite, and that the acts done should be equally clear and definite and solely with a view to the performance of the particular agreement.* If the language employed leaves the intention of the parties who executed the contract in doubt, or if there is uncertainty in regard to what was intended, a court of equity will not undertake to decree a specific performance. The minds of the parties must meet. *The testator must understand that he is not merely promising to do something in the future, but is doing it now; that he is relinquishing his right to change his mind.* The parties must express themselves in such terms that their intention can be ascertained to a reasonable degree of certainty; and, if the agreement is so vague and indefinite that it is not possible to collect the full intention of the parties, it is not enforceable in equity. Neither the court nor the jury can make an agreement for the parties." (Italics added)

See also, a supplemental annotation in 106 A.L.R. 742.

Certainly the testimony delineated above does not establish by the clear, convincing, and unequivocal standards the specific terms of any contract. Was the Plaintiff to receive the bank stock and home of decedent or was he to receive all of her property? Did decedent understand that she was not merely promising to do something in the future but that she was promising specifically to do something now, relinquishing her right subsequently to change her mind if she so desired? Was the Plaintiff moving from Ogden to Provo to take a job in the bank for his own financial and pecuniary benefit or for the financial and pecuniary benefit of decedent? There is no testimony at all in this case that Plaintiff was obligated by any agreement to provide the filial service, affection, companionship, and society which is necessary to invoke the power of a court in equity to compel specific performance.

Assume, however, for the moment that there is evidence that a contract existed requiring the Plaintiff to take care of Plaintiff's personal and financial affairs. There is no evidence in the record which would support a finding that Plaintiff did in fact take care of such personal and financial affairs. Reference was made by Mrs. Mildred Brereton that decedent stated she wanted someone to handle her affairs in the lumber business. (Tr. 16, 22, 30) There is no testimony in this record that Plaintiff did anything to assist decedent in this matter. The evidence, likewise, shows that decedent had

other financial interests, but nothing the Plaintiff did would indicate a management of these affairs for decedent.

It is true there is testimony that Plaintiff and members of his family gave attention to the decedent by furnishing her meals, caring for her lawn and grounds, and showing her personal attention. There was no claim that these acts constituted the basis of the agreement. Nor could the Plaintiff prove an agreement between him and decedent by showing certain acts on his part. Such evidence is wholly self-serving insofar as showing any agreement betweent the parties and is admissable only to show performance on his part in the event the specific terms of the alleged contract are otherwise proved by clear, convincing and unequivocal testimony. The fact is, the evidence shows that Plaintiff and decedent were on close personal terms before 1946, as well as after, and that Plaintiff's wife did decedent's washing and decedent consulted Plaintiff on financial matters. (Tr. 21, 29)

The above acts are entirely consistent with the view that Mr. Randall hoped to maintain the good graces of his relative to the end that she would leave him some or all of her property on her death, that he devoted some time and attention to her personal wants in order to influence her in making him the principal beneficiary under her Will. There appears to be no doubt that Mrs. Brereton knew she was bestowing most of her property upon Mr. Randall during a considerable period between the time of the death of her husband and

her own death. But by the same token the evidence demonstrates clearly that she understood she had the right to change her Will at any time she desired, which she did. It is very significant that the testimony shows that Plaintiff was apparently aware of the changed attitude on the part of decedent some time before her death because he discussed it with the witness, Will Brereton. (Tr. 67)

It is Appellant's further contention that before a purported oral agreement may be specifically enforced, the law requires that the agreement relate to services which are of such a peculiar character that is it impossible to estimate their value by any pecuniary standard.

In the very early Utah case of *Brinton v. Van Cott,* 8 Utah 480, 33 P. 218, the Court set out one of the important criteria in determining whether an agreement to will or leave a party property will be enforced, as follows:

> "When the consideration of the agreement consists in work, labor, and services personally done and rendered by the Plaintiff, *if the value of the same can be ascertained with reasonable accuracy in an action at law, and adequately compensated by the recovery of damages, then neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement.* But if the services are of such a peculiar character that it is impossible to estimate their value by any pecuiary standard, and it is evident that the parties did not intend to measure them by such standard, then the Plaintiff, after the performance of these services could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages." (Italics added)

In *Olsen v. Dixon,* 165 Minn. 124, 205 N.W. 955, the rule is stated thusly:

> "A contract [to devise one's estate] cannot be enforced specifically unless the assumption by the promisee of the relations of a personal and domestic nature is one of the elements of the contract. If the services to be performed are not those which the promisor may procure from a hired servant, and if they consist, in whole or in part, of giving to the promisor the companionship and personal attention which are common among members of a family living together in one household, and which are incapable of measurement by pecuniary standards, specific performance of the contract may be decreed. But, if the services might have been rendered by a stranger as satisfactorily as by the promisee, and the relations of the parties are not of a peculiarly personal or domestic nature, the promisee has a claim against the promisor for the reasonable value of the services, and nothing more."

In the case *Ehling v. Diebert* (N.J.) 15 Atl. 2d 655, the Plaintiff did not live with the decedent, but worked in her butcher shop. He claimed that deceased promised him that if he would take care of her affairs she would leave him everything upon her death. Testimony was given that he became her constant companion, took her for rides and spent all his time with her, helped her with household duties, and collected rents for her. Plaintiff testified that after he married he spent so much time with deceased that it almost broke up his marriage. The Court determined that deceased had paid the Plaintiff a salary for his work, and that the personal attention

given to decedent was not such as to require specific performance of the contract.

The case of *Andrews vs. Aiken,* 44 Idaho 797, 260 P. 423, 69 A.L.R. 14, is likewise illustrative of a situation in which the claimant performs work of a business or household nature not involving such companionship and filial responsibility that such services cannot be compensated for in money. The duties of Aiken were to rent property, collect rents, pay taxes, make settlements with tenants, pay over profits to decedent, and other incidental managerial activities. In reviewing the cases involved with the problem of enforcing purported agreements of the kind presented in the instant case, the court held:

> "In practically all the cases where specific performance was decreed, the contracts called for the performance of duties of a filial and intimate personal nature, the value of which could not be estimated. This, of course, presents an entirely different question, and such authorities are not in point in this case. Here the deceased or promisor was not to live in the family of the respondent, and no close, intimate, or filial relationship was to exist. The contract simply required respondent to look after the business of the deceased. He was to handle the farms and various properties, receive and disburse moneys, and in general act as the business advisor and assistant of the owner. He was required to render no service that an ordinary real estate agent or factor could not and does not perform for his clients. This was not a contract for the personal care of an aged person where great patience with his infirmities was required, contemplating not only food, medicine, and clothing, but good tem-

per, forbearance, and honest effort to please, and an intimate family relationship; but was simply a business arrangement for the management and care of the property of the deceased."

To the same effect are the authorities cited in the annotation in 69 A.L.R. commencing at page 145.

It is also significant that the decedent had housekeepers and companions who stayed with her in the home, provided for her personal needs, and gave her association and companionship from day to day.

The testimony of Mrs. Mildred Brereton concerning this matter, after she left the home of decedent, is as follows:

"Q. At the time you left her, did she have anyone there to look after or help her take care of her?

"A. I think Mrs. Celventra was there.

"Q. Following that time and up until 1946, did she have ladies, from time to time, who lived with her on a friendly basis and helped her in the home?

"A. She had people that would come in. Mr. and Mrs. Sorensen were there for awhile. They moved up from southern Utah. I don't remember exactly when. I remember when she told us they were coming and they lived there and took care of the house and furnished the groceries and she was giving them rent free.

"Q. Over what period of time was this to go on?

"A. About two years.

"Q. Do you know what years it was?

"A. I think probably from 1944 to 1946.

"Q. Do you know whether there was anyone there staying with her in the Fall of 1946 when Will Randall came down?

"A. They were still there, I think.

"Q. They were still there at that time?

"A. During the time he first came down to the bank, they were there.

"Q. Following that time that he moved down, in the Fall of 1946, came down to work in the bank, until 1950, until her illness in 1950, did she have anybody live with her at the time?

"A. Off and on she did, I think.

"Q. And the people that lived with her were there day after day while they were living there, and stayed there at night, didn't they?

'A. No, she had a lady that just stayed at night, for awhile.

"Q. But she also had some people that stayed during that time or part of the time, didn't she?

"A. I couldn't tell you exactly when she started having them stay in the daytime.

"Q. Do you recall any more specifically as to what the Randalls did, than what these other people did for her during this period, Mrs. Brereton?

"A. Even when the ladies were there, they never did the wash or ironing.

"Q. But they were there and stayed there and looked after her in the daytime or the nighttime, isn't that right?

"A. They did take care of her.

"Q. Since 1950 she has had someone there all the time, both day and night, hasn't she?

"A. I think so.

"Q. Up until the time she died?

"A. Yes."

It must be remembered that although Plaintiff assisted in finding such companions for decedent they were all paid by decedent and not by Plaintiff. And the fact that none of these people who personally attended decedent were ever called as witnesses demonstrates forcefully that Mrs. Brereton had never discussed any agreement with them. Surely, the existence of a specific, unequivocal contract would have been communicated to one or more of these close companions — if in fact such an agreement existed.

The slight innuendoes relied on by Plaintiff that decedent remarked on occasions that she had something coming from Will Randall, or that he owed it to her, or that it was Will's job, or that he would be taken care of, have less probative value than does the failure of the decedent to mention any purported agreement to her various attendants.

We therefore, respectfully submit that the evidence is insufficient to sustain the burden required of the Plaintiff to prove that a specific agreement was entered into and that Plaintiff performed the conditions thereof required of him.

POINT II

THE PLEADINGS AND EVIDENCE REQUIRE THE FINDING THAT ANY SUCH PURPORTED AGREEMENT WAS WITHIN THE STATUTE OF FRAUDS AND UNENFORCEABLE.

Section 25-5-3 U.C.A. 1953, provides:

> "Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interests in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing."

The contract here claimed by the Plaintiff was to the effect that decedent would leave him certain real property and bank stock. The fact that the alleged contract in this case involved not only real property, but personal property, does not take it out of the Statute of Frauds relating to real property. The law on this point is well settled as set forth in 49 Am. Jur., Statute of Frauds, Sec. 216 as follows:

> "Where the agreement is to devise and bequeath both real and personal property and the consideration therefor, is entire, as for example as entire in its nature, and if oral, the whole fails, even though the part relating to the personalty if standing alone would not have been invalidated by the statute. The rule applies not only to oral contracts to devise and bequeath both realty and personalty, but to agreements by which the promisor in general terms leaves all of his property to the promisee, and the promisor dies leaving both real and personal property; such an agreement is deemed to be one for a

transfer of an interest in land although the promisor may not have owned any real property at the time the agreement was made."

See also: *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760; *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561; 15 A.L.R. 2d 1325.

The fact that the contract here alleged is within the Statute of Frauds gives rise to the principle of law heretofore enunciated by this court as to the requirements that the contract must be complete and certain in its terms and must be established by clear, convincing and unequivocal evidence. See, *Clark v. George, supra.*

As heretofore pointed out, the court will never enforce a parole contract to convey property in consideration of personal services (assuming for the purpose of this argument that there was sufficient evidence of such an Agreement here) where the services are measureable in value in monetary terms. See, *Brinton v. Van Cott,* supra; *Andrews v. Aiken,* supra. In all of the cases where the court has enforced the agreement the party claiming the benefits of the parole contract lived with the decedent and was a constant and close companion. In the instant case Plaintiff was neither. He lived in his own home with his wife and family and visited his Aunt when he desired so to do or when asked to do so by decedent.

This Court has had occasion to pass upon the question of whether services of the kind rendered by Plaintiff and his family for decedent are capable of being

valued in money. In the case of *Startin v. Madsen* (1951) 120 Utah 631, 237 P 2d 834, the Plaintiff was seeking to recover the reasonable value of service performed for decedent. A judgment in favor of the Plaintiff was affirmed on appeal by the Supreme Court which summarized the facts as follows:

> "James Madsen, brother of plaintiff and defendant, died at 88, having been bedridden and in need of close personal care for the previous six years. His aged wife, Priscilla, was able to do some household tasks the fore part of this period, but was in need of some care and assistance herself, particularly during the last two years when her memory completely failed her. Plaintiff lived about two blocks away. Her husband also was very ill during part of this time, and although she had to divide her attention between her own home and that of the Madsens, she nevertheless prepared meals for the Madsens, first at their home, and later for several years at her own home, carrying them the two blocks three times daily. Assisted somewhat by her daughter and daughter-in-law, she prepared these meals, bought provisions, cleaned the Madsen home, washed their clothes and linens, bathed Mr. Madsen, changed his bedding, gave him medicine when needed, and otherwise provided comfort and necessaries principally to Mr. Madsen and partially to Mrs. Madsen. Her services became increasingly burdensome as the Madsens grew older. Plaintiff's other brother, defendant herein, and his son also assisted the Madsens some."

The above services were rendered over a period of six years (approximately 2,190 days). The court, after quoting from 58 Am. Jur. Work and Labor, Section 63, to the effect that a jury may determine the reasonable

value of labor performed upon request without a specific contract therefor, even though there is no evidence of the value of such labor, went on to say:

> "This rule would apply to the type of work the plaintiff did. The term "practical nurse" is just another name for ordinary housekeeping and the personal care and attention which everyone gives to sick people in their own homes; that is, to prepare the meals, feed, bathe, clothe, change their clothing and their bedding and attend to their needs. There is nothing particularly technical nor pofessional about it. Every person of ordinary intelligence and understanding knows what that work consists of and has some idea to its value."

In another case, *Burton v. McLaughlin,* (1950) 117 Utah 483, 217 Pac 2d 566, this Court affirmed an award against the Estate of Patrick Henry McLaughlin for services rendered including cooking, mending, housekeeping, running errands, and looking after the personal needs of decedent when he was sick.

See, also, *Holsz v. Stephen,* 362 Ill. 527, 200 N.E. 601, 106 A.L.R. 737. There the Illinois Supreme Court announced the rule to be:

> "Even where the terms of the contract are clear, certain, and unambiguous, specific performance is not a matter of right, but rests in the sound discretion of the court to be determined from all the facts and circumstances. Edwards v. Brown, 308 Ill. 350, 139 N.E. 618. The remedy is afforded where the contract has been performed by one party in such a way that the parties cannot be placed in statu quo or damages

awarded which would be full compensation. Weir v. Weir, 287 Ill. 495, 122 N.E. 868; Koenig v. Dohm, 209 Ill. 468, 70 N.E. 1061. The performance relied upon must place the party who has performed in such a situation that it would be a fraud upon him if the agreement were not carried out. Nelson v. Nelson, 334 Ill. 43, 165 N.E. 159. To take an oral promise which has been partly performed out of the statute, part performance must be such that a restoration of their previous condition is impracticable and a refusal to go on and complete the engagement would be a virtual fraud upon the parties. Shraver v. Wickwire, 335 Ill. 46, 166 N.E. 458; Stephens v. Collison, 313 Ill. 365, 145 N.E. 81. The performance of personal services, the value of which may be estimated in money, or for which a recovery may be had at law, will not take the contract out of the statute, because the law affords an adequate remedy.

The evidence in this case would dearly demonstrate that the services rendered by Mr. J. Will Randall, the Plaintiff, as well as by members of his family, could be, and were during her life time compensated for by decedent in money or property.

POINT III

THE COURT ERRED IN CERTAIN RULINGS ON THE EVIDENCE.

It was and is Appellant's position in this case that Plaintiff came to Provo to work in the bank because such change of position immediately increased his income, and that over the years Plaintiff was adequately paid and compensated for any services which he may

have rendered to the decedent. In the first place, although Respondent claims he gave up his business in Ogden and moved to Provo as a part of a purported agreement between Plaintiff and decedent, the evidence shows that he did not give up any business but continued to own the same interest in the Pioneer Coal and Lumber Company at Ogden and still maintains his position as President. (Tr. 69)

On cross examination counsel attempted to interrogate the witness Kay Randall with respect to the salary and income his father received in Ogden as compared to the salary and income he received on accepting a position with the State Bank of Provo. Although counsel explained Appellant's position to the Court, the Court refused to allow any testimony on the matter. (Tr. 96, 97). Certainly such evidence was admissable to negative the claim of Plaintiff that he went to Provo because of an alleged agreement when the change in financial position may well have been such as to have explained the reason for his move.

The Court did allow testimony to the effect that during the years, both before and after Plaintiff left Ogden and came to Provo, decedent gave him various items of property, including 1200 shares of Utah Timber and Coal Company stock, real property located in Los Angeles of a value of between $1,500 and $2,000, and 20 shares of stock in the State Bank of Provo. (Tr. 98, 99). The value of the foregoing property is indicated by the probate file in the Matter of the Estate of Sarah P. Randall Brereton, Deceased, (Probate No.

10915) which was introduced in evidence at the trial. The Inventory and Appraisment shows the Utah Timber and Coal Company stock to be of the approximate value of $8,400.00, and the 20 shares of stock in the State Bank of Provo to be of the approximate value of $6,440.00, making in excess of $16,340.00 received by Plaintiff from decedent.

In addition to the property which decedent gave to Plaintiff, Kay Randall testified that she had given him $100 on one occasion and 200 shares of Timber and Coal stock on another occasion.

If the court had permitted counsel to inquire into the salary received by Mr. Randall upon his coming to Provo and thereafter, the evidence would have demonstrated clearly the reason behind the move, as well as the reason behind the attentions paid by Plaintiff to decedent. Such evidence also explains why Mrs. Brereton on occasion may have stated that, "She had it coming," or that "Will owed it to her," or such other similar comments.

Claim is also made by Appellant that the trial court improperly admitted the testimony of Clyde Sandgren, an attorney-at-law, who testified concerning certain conversations he had with the decedent.

On Voir Dire examination prior to giving testimony of the conversations, Mr. Sandgren testified as follows:

> "Q. And your conversation with Mrs. Brereton, on this occasion as well as on other occasions, was in a matter of business, wasn't it?

"A. Yes.

"Q. She owned the controlling interest in the bank and she was the one that was obtaining your legal advice in respect to what should be done relative to this stock, isn't that correct?

"A. Yes, she sought my advice with respect to it. (Tr. 72, 73)

"Q. Your occasion for being over at her home was that she called you over there to discuss this matter you were working on for the bank, is that not right?

"A. Well, it was to discuss with me the disposition of her stock in the bank, that's right.

"Q. She called you over for the purpose, to discuss with you the disposition of her stock in the bank?

"A. Broadly speaking, that would be true.

"Q. And you recognize her at that time as being the president and the one who held the controlling interest in the bank?

"A. Yes, I knew she was president and that she held controlling interest.

"Q. And you were aware, in her discussion with you, that she wanted to seek your advice and to have your advice here with reference to her stock in the bank?

"A. Yes, I think I would have to say yes to that. (Tr. 76)

"Q. Didn't the nature of your work with Mrs. Brereton relate to her disposition of her stock in the bank?

"A. Yes.

"Q. From the very first time you saw her, including all the transactions you had with her?

"A. Yes.

"Q. And in connection with that very first conversation, you realized she was discussing this matter with you in terms of obtaining your advice and counsel as an attorney?

"A. Would you mind repeating the question?

(Last question read.)

"A. Yes.

"Q. And you realized that, in her calling you over there, that she was seeking to get your professional advice?

"A. Yes. (Tr. 77, 78)

"Q. But you never told her you were not going to bill her for these other services, did you?

"A. No.

"Q. You never told her you weren't going to represent her in connection with these other matters she had talked to you about?

"A. No." (Tr. 79)

Our Statute, Section 78-24-8 (2), U.C.A. 1953, provides:

> "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein, in the course of professional employment."

The case of *City and County of San Francisco v. Superior Court,* 31 Cal. 2d 227, 231 Pac. 2d 26, 25 A.L.R.

2d 1418, discusses the privileges of the attorney-client relationship and states the grounds therefore as follows:

> "The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. 'Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of suprises, much useless litigation may result. Thirdly, unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts.' Morgan, Foreword, Am. Law. Inst. Code of Evidence, pp. 25-26. Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him. 'The absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent.' 8 Wigmore supra, Sec. 2380a, p. 813."

This same view was upheld by this Court in the case of *Burton v. McLaughlin,* supra. See, also, Mangan's Will, 185 Wis. 328, 200 N.W. 386; *Collins v. Collins,* 110 Ohio St. 105, 143 N.E. 561; *In Re Bayer,* 116 Neb. 670, 218 N.W. 746.

According to the testimony of Mr. Sangren all of the conversations he had with decedent were in con-

nection with her seeking legal advice from him as to the disposition of her property by Will. We therefore submit that his testimony as to such conversations was unadmissible. This would not make unadmissible the letter (Exhibit A) sent to Tracy-Collins Trust Company which letter on its face indicates that Mrs. Brereton at that time desired to leave to the Plaintiff a sufficient amount of stock to give him control of the bank and asked Mr. Newell B. Dayton, Vice-President of Tracy-Collins Trust Company if her Will so provided. If Mrs. Brereton had previously made an agreement to leave Plaintiff such bank stock (and had performed such agreement by making a third codicil to her Will in the spring of 1946), there was certainly no reason for her to write Exhibit A.

The trial court by its ruling as well as its comments (Tr. 74, 75), and also the jury, apparently gave considerable weight to the testimony of Mr. Sandgren as to his conversations with decedent which were inadmissible.

POINT IV

THE COURT ERRED IN SUBMITTING THE MATTER TO THE JURY AND IN FOLLOWING ITS DETERMINATION OF THE FACTS.

It is Appellant's position in respect to this point first that the court should not have tried the matter to a jury. Defendant made a motion to strike the cause from the jury calendar for the reason that the matter was not one in connection with which the Plaintiff had

a right to trial by jury and the court would be in a much better position to determine the facts than a jury which was denied. (R. 9)

Counsel is of the opinion that the trial court desired to avoid determining the sufficiency of the facts and for that reason placed the responsibility upon the jury well knowing that the evidence, such as it may be, would be uncontradicted because there would be no one available to testify contrary to what might be testified to by Plaintiff's witnesses. The very nature of a case such as the one now before the court is such that dispute in the evidence is rarely possible. Persons having contact with the decedent may testify with respect to conversations which they purportedly had, but neither the decedent nor any third person can come in and dispute the fact that such conversations took place. Thus, the only purpose served by having a jury would be to see if the nature of the evidence introduced by the Plaintiff would be such as to influence the jurors to recognize Plaintiff's claim. Obviously after the jury has returned its verdict, the court is in a strong position to find in favor of the Plaintiff notwithstanding the legal insufficiency of the evidence. By such a method little effect, if any at all, is given to the rule of law requiring the claimant to prove by clear, convincing and unequivocal testimony, not only that an agreement was made but the specific terms thereof.

Responsibility of the trial court in this case fairly and impartially to hear and determine the matter could not be delegated to a jury in order to give additional

weight or support to the claims of the Plaintiff by a sympathetic verdict in Plaintiff's favor.

Appellant further contends that the case should not have been submitted to the jury because the evidence was insufficient. Counsel made appropriate requests for a directed verdict but the same were denied. (R. 24, 25). If, however, this court should find that there was some evidence to go to the jury, then the trial court should have submitted it to them upon proper instructions.

Although counsel requested the court to instruct the jury that the burden was upon the Plaintiff to prove the specific terms of the contract by "clear, convincing and unequivocal testimony" the court refused so to do, stating merely in Instruction No. 2 that the proof should be "clear and convincing." (R. 15) As originally drafted, this instruction used the phrase "clear, positive and unequivocal"; but the court changed its mind about the matter before submitting it to the jury and instructed them as above indicated. (R. 15) Likewise, the court instructed the jury in Instruction No. 2, that it was necessary to find that the terms of the contract were "substantially" as set forth. (R. 15) Exception was taken to this instruction by the Defendant, (Tr. 144) and apparently some time since the case was decided someone has drawn a line through the word "substantially" in the instruction. (R. 15)

In view of the repeated declarations by this Court of the quantum and quality of proof necessary to esta-

blish an oral agreement to convey real property by a decedent, we submit that the foregoing instructions not only misled the jury but likewise the trial court in reaching its decision.

Defendant further requested the court to instruct the jury that the law "jealously guards and protects the right of an individual to dispose of his or her property after her death as such person may desire, and it is not for you or the Court to pass judgment upon the decedent in this case as to whether she has wisely or equitably disposed of her property by her last Codicil to her Will and Testament. How you or I may have disposed of our property under circumstances of this case is entirely immaterial.

You may, however, consider the terms and conditions of her Will and the various codicils thereto, in determining whether or not decedent had entered into a contract with Plaintiff as claimed by him." (R. 30) Again we submit that this instruction was proper and the subject matter thereof should have been taken into consideration by both the court and jury in arriving at any decision in this case.

The effect of the court's instructions was to impress the jury that if there was any evidence to support a finding in favor of Plaintiff they should do so. The Court apparently adopted this same theory in reaching its decision after the jury's verdict was returned. For instance, Instruction No. 3, excepted to by Defendant, Tr. 114), advises the jury that an oral agreement "is

as binding upon the parties as a written agreement when such agreement has been established to the extent that it is required by the law," without at that time advising the jury as to the burden which the Plaintiff had to establish such contract and further without giving the jury the benefit of Defendant's Requested Instructions Nos. 3, 4, 6, 7, and 8.

It appears to Appellant that the trial court did not follow the law, either in its instructions to the jury or in considering the matter subsequent to the verdict.

CONCLUSION

By way of summary Appellant respectfully urges:

1. The Plaintiff failed to allege and prove by clear, convincing, and unequivocal evidence that any contract as claimed existed between him and the decedent.

2. The evidence is insufficient to show that Plaintiff performed any contract justifying the court in ordering specific performance.

3. The evidence shows that any service performed by the Plaintiff were, or could be, compensated for in money so that specific performance in any event should be denied.

4. The court erred in its ruling on the evidence, which if properly determined, would have required a verdict for the Defendant in this matter.

5. The court erred in submitting the matter to the jury and in the instructions which it gave upon the issues.

6. Subsequently, in following the verdict of the jury and in giving effect to the errors committed in its instructions, the court improperly entered Judgment for the Plaintiff and against the Defendant.

In urging this Court to reverse the trial court, we desire to adopt the language of the text appearing in 69 A.L.R. at page 167, as follows:

> "It has been remarked that contracts of the character in question have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them, and as to enforcing them when established. Also, that cases of this character are inherently easy to prove and hard to combat,—a characteristic that should not impair the action when proved, but which should cause the court to proceed with caution. And the view has been expressed that, when such a contract is made the basis of an action, the evidence in support of it should be looked upon with great jealousy, and weighed in the most scrupulous manner. The character, conduct, and testimony of the witnesses should be as to inspire confidence that they are telling the truth. Such a contract can be enforced only when it is clearly proved by direct and positive testimony and its terms are definite and certain.
>
> "Where a decree for the specific enforcement of a contract to will all of the owner's property to another will have the result of rendering ineffectual the promisor's will, and pass

to the promisee the title to all the property left by him at his decease, subject only to the claims made thereto by law for the widow, justification for such judgment can only be found in a contract fully executed by the promisee, definite and certain in every essential, and made to appear by clear and convincing proof. If, therefore, the proof submitted does not bring the case within the rule requiring execution of the contract, the parties will be left to their redress at law."

Respectfully Submitted,

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